

STATE OF MICHIGAN
COURT OF APPEALS

UNISITE, LLC, f/k/a UNISITE, INC.,

Plaintiff-Appellant,

v

JOEL L. YOUNG, BRENDA S. YOUNG,
TRISTAR INVESTORS, INC., and BIG TOP
VENTURES, LLC,

Defendants-Appellees.

UNPUBLISHED

April 3, 2014

No. 314150

Eaton Circuit Court

LC No. 12-000445-CK

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this action in which plaintiff sought to enforce a confidentiality clause contained in a ground lease with defendants Joel L. Young and Brenda S. Young. The trial court found no genuine issue of fact that the clause is unenforceable as an unreasonable restraint on the alienation of the Youngs' property. We reverse and remand for further proceedings.

I. FACTS

Plaintiff is a tenant under a lease executed on January 28, 1999,¹ that granted plaintiff the right to operate a cellular communications tower on property owned by the Youngs. The lease contained a confidentiality clause that stated:

Neither party, without the written consent of the other, shall disclose to any third party any of the terms or conditions of this Ground Lease, or any information provided during negotiation of this Ground Lease, other than as disclosed by recording of the Memorandum of Lease [sic] Ground Lease or as required by final order of a court of competent jurisdiction.

¹ The initial term of the lease was 15 years with three rights of renewal of five years each.

Plaintiff argues that the Youngs violated the confidentiality clause by disclosing the rental rate and other terms of the lease to defendants TriStar Investors, Inc. and Big Top Ventures, LLC. Big Top is a second tier subsidiary of TriStar. The Youngs granted TriStar/Big Top an exclusive easement in the property on February 19, 2009. The easement provided that it was “exclusive except for any contrasting rights granted prior to the Effective Date via the leases or other agreements listed on Exhibit C,” but that, the Youngs are “not assigning and shall continue to comply with all of Grantor’s obligations as lessor under the Current Agreements.” The lease is listed as the primary current agreement. The Youngs admittedly provided TriStar with a copy of the lease before they signed the exclusive easement. Additionally, the Youngs admittedly provided TriStar with information regarding payments under the lease. No request for permission from plaintiff was made regarding these disclosures.

Plaintiff filed a complaint for declaratory judgment seeking to invalidate the easement and permanently enjoin defendants, and also raised claims for breach of contract and breach of the Michigan Uniform Trade Secrets Act, MCL 445.1901 *et seq.* The Youngs, joined by TriStar/Big Top, moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The court granted defendants’ motion for summary disposition in a written opinion on July 9, 2012. As relevant to this appeal, in the initial opinion granting summary disposition the court found the confidentiality clause to be unenforceable as an unreasonable restraint on alienation. Finding that the confidentiality clause was unenforceable, the court found no grounds for declaratory relief. The court also found the trade secret claim barred by the statute of limitations. On plaintiff’s motion for reconsideration, the court issued a second written opinion, dated December 12, 2012, noting that it likely erred in dismissing the plaintiff’s trade secret claim as time-barred. However, given that the confidentiality clause remained unenforceable, the court determined that the trade secret claim failed because it was impossible for defendants to misappropriate a trade secret where no duty of confidentiality existed.

II. STANDARD OF REVIEW

When a party moves the trial court for summary disposition under MCR 2.116(C)(8) and (10) and the trial court considers documents outside of the pleadings when deciding the motion, we review the trial court’s decision under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). A trial court’s ruling under MCR 2.116 (C)(10) presents an issue of law subject to de novo review. *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 52; 684 NW2d 320 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The Court is to view “the pleadings, affidavits, depositions, admissions, and other admissible evidence in the light most favorable to the nonmoving party.” *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 NW2d 504 (2012). To survive the motion for summary disposition, plaintiff may “not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The “mere possibility that the claim might be supported by evidence” is insufficient to survive a motion for summary disposition.

Interpretation of a contract is subject to de novo review. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). The words and language in the contract are given their

plain and ordinary meaning. *Id.* Interpretation of a contract seeks to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). “[A]n unambiguous contractual provision is reflective of the parties’ intent as a matter of law,” and if “the language of the contract is unambiguous, we construe and enforce the contract as written.” *Id.* at 375.

III. DISCUSSION

The trial court found the confidentiality clause unenforceable as an unreasonable restraint on alienation. Michigan follows the common-law rule against unreasonable restraints on alienation of property. “A restraint on alienation of property is defined as an attempt by an otherwise effective conveyance or contract to cause a later conveyance (1) to be void (disabling restraint), (2) to impose a contractual liability upon the conveyance for conveying in breach of the agreement not to convey (promissory restraint), or (3) to terminate all or part of a conveyed property interest (forfeiture restraint).” *LaFond v Rumler*, 226 Mich App 447, 451; 574 NW2d 40 (1997) (citations omitted). Additionally, “Michigan recognizes a strong public policy against restraints on alienation.” *Albro v Allen*, 434 Mich 271, 281; 454 NW2d 85 (1990).

Neither the confidentiality clause nor any provision of the lease prevents or limits the Youngs from selling or otherwise disposing of their property. The trial court found the confidentiality clause to be an unreasonable restraint on alienation because “it prevents the Youngs from alienating their property in various ways for 30 years, including selling or mortgaging their property as both would require disclosure of lease terms in order to obtain willing buyers or lenders” and that the “provision allows Unisite, in its sole discretion, to prohibit the Youngs from talking to any competitor or attempting to alienate their property in any way for 30 years, thus allowing Unisite to have control over renewals of the lease at the end of the 30-year term.”

In *LaFond*, 226 Mich App 447, this Court considered an addendum which called “for the parties to split the profits from any sale and provide[d] for the resolution of disputes through the use of appraisers, giving ultimate and binding authority to settle any disputes regarding the transfer to an independent appraiser.” *LaFond*, 226 Mich App at 455. This Court found the addendum to be an unreasonable restraint on alienation because the “addendum, although bargained for by the parties, goes unreasonably beyond protecting the defendant’s interest in ensuring payment under the original land contract.” *Id.* This was particularly true because, if the parties could not agree on price, “the whole transaction potentially falls under the control of a person, the independent appraiser” who may set a price the buyer is unwilling to pay. *Id.*

This case is distinguishable from *LaFond* because plaintiff does not possess singular control over any selling process nor the material issue of setting the price. Rather, any delays in the selling process that could result from securing disclosure of the lease terms would at most only “impair the marketability of property” but would “not be restraints on alienation” of the property itself. *LaFond*, 226 Mich App at 456 (quotation and citation omitted). Disclosure of the lease terms does not directly affect the ability to sell or transfer the land. Although a delay in disclosing material terms to a potential buyer might hinder a sale, and thus impair the marketability of the subject property, it would not cause that subsequent sale to be void or violate an agreement not to convey or forfeit the conveyed property interest. In short, even if “practical

alienability might, in some instances, be restrained by such a contract,” such a clause is not a direct restraint on alienation so as to “tie up alienation of the property as a matter of law for a second’s time.” *Lantis v Cook*, 342 Mich 347, 358-359; 69 NW2d 849 (1955) (internal quotations omitted).

Further, in *LaFond* the clause at issue directly affected the land. Here, the confidentiality clause at best indirectly affects the land. Both the defendants and the court below depend upon an interference with mortgage negotiations to find an unreasonable restraint on alienation. Defendants do not allege any attempts to secure a mortgage or convey any interest in the property, except for the easement at issue. Even if the Youngs sought a mortgage, the confidentiality clause would neither disable nor void alienation, nor forfeit an alienation. Therefore, for the clause to be a restraint, it must “impose a contractual liability upon the conveyance for conveying in breach of the agreement not to convey” *LaFond*, 226 Mich at 451. The confidentiality clause did not contain an agreement not to convey. Because the clause does not prevent or limit the Youngs from selling or otherwise disposing of their property, we conclude that it is not a restraint on alienation as a matter of law.

Additionally, even if possible interference with future mortgage negotiations could be a restraint of alienation, the clause at issue here remains reasonable. No mortgage negotiations have ensued and thus there has been no injury on an attempted alienation of the property. More importantly, the clause at issue contains exceptions that allow for communication with a mortgagee. The clause allows for admission of information “as disclosed by recording of the Memorandum of Lease [sic] Ground Lease” or by court order. The memorandum displays the names of both parties, the purpose of the lease, and its term plus extensions. While the memorandum does not disclose the price term, it does disclose the contracting parties and the term, both of which enable a prospective buyer or mortgagee to conduct further due diligence. Although the memorandum has not been recorded, the right to record is not exclusive. The Youngs could insist on recordation or seek recordation themselves. Indeed, in the performance of both recordation and granting consent under the confidentiality clause, plaintiff is required to act in good faith. See *Hammond v United of Oakland, Inc.*, 193 Mich App 146, 151-152, 483 NW2d 652, (1992). Finally, the paragraph that contemplates recordation of the memorandum by plaintiff also contemplates future encumbrance by “mortgage or deed of trust” by the Youngs. By its terms, the lease contemplates some disclosure of terms if the Youngs sought to mortgage or sell the property and includes a mechanism for that disclosure. The memorandum contains sufficient information to put a potential buyer on notice regarding the lease and the need for due diligence. Although additional information might be sought, plaintiff would be required to act in good faith responding to those requests, as contemplated by the parties under the contract. And, as noted above, the Youngs were not without other recourse. Under the term of the agreement, they could either seek permission from plaintiff to discuss the terms with others, or file an action otherwise seeking relief.

Given the enforceability of the confidentiality clause, there is a clear duty that neither party “without the written consent of the other, shall disclose to any third party any of the terms or conditions” of the lease. The Youngs admitted disclosing the lease and payment terms without written consent. These facts were properly pled in the complaint and, therefore, the complaint is legally sufficient to state a claim for breach of contract and to support a claim for

declaratory relief. Thus, to the extent the trial court's opinion can be read to grant dismissal of these claims under MCR 2.116(C)(8) or (10), we conclude that this was erroneous.

In addition, while it determined the clause to be unenforceable, the trial court also found "the only breach that may have occurred involved the confidentiality clause" and that it was "unlikely that such a breach could be considered material." However, determining whether a breach is material involves weighing several factors. *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957); *Omnicom of Mich v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). In *Omnicom*, a panel of this Court stated

[i]n order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract. In determining whether a breach is material, the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive. Other considerations include the extent to which the injured party may be adequately compensated for damages for lack of complete performance, the extent to which the breaching party has partly performed, the comparative hardship on the breaching party in terminating the contract, the willfulness of the breaching party's conduct, and the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. [*Omnicom*, 221 Mich App at 348 (citations omitted).]

In dismissing the materiality of this possible breach as "unlikely," the court did not consider any of the factors from *Omnicom* nor make any other inquiry into the materiality of the admitted breach. Accordingly, we remand for further findings on this issue.

Finally, the court dismissed plaintiff's claim under Michigan Uniform Trade Secret Act on the ground that the confidentiality clause was unenforceable. In light of our conclusion that the trial court erred by finding the confidentiality clause unenforceable, we reverse the order granting summary disposition of this count and the trial court shall revisit it on remand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ E. Thomas Fitzgerald

/s/ William C. Whitbeck